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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959

No. [illegible]

MEMPHIS A. F. L.-C. I. O. LABOR COUNCIL, et al.,
Petitioners,

vs.

CITY OF MEMPHIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Memphis A. F. L.-C. I. O. Labor Council, consisting of more than 100 thousand electric consumers, with other individual electric rate payers and consumers, pray writ of certiorari issue to the Court of Appeals and Supreme Court of Tennessee to review judgment entered herein June 6, 1960, depriving them and other electric consumers by arbitrary illegal rates of more than $3 million, and affecting the marketing of the Tennessee Valley Authority and other public electric power of the United States.

CITATIONS TO OPINIONS BELOW.

These illegal electric rates were arbitrarily fixed by the City Commission of the City of Memphis by order, printed in Appendix, page 49. The Chancellor issued a temporary injunction (Appendix, pages 21 and 22); but the appellate court held the Chancellor was without jurisdiction to review these rates although allegedly illegal, unfair, exhorbitant, excessive, discriminatory, confiscatory, arbitrary, unreasonable, fraudulent, unconstitutional and void (Appendix, pages 23 to 27).

Judgments, orders, opinions and decrees of Courts and administrative agencies herein are not reported but are appended to this petition.

JURISDICTION.

The judgment of the Supreme Court of Tennessee was entered on June 6, 1960 (Appendix, p. 28 and R. 131).

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257 (3), since this involves titles, rights, privileges and immunities specially set up and claimed by these petitioners under the Constitution of the United States, Fifth and Fourteenth (Section 1) Amendments, granting them freedom and immunity from this violation of due process and arbitrary deprivation of their property by these illegal and confiscatory rates.

Jurisdiction is also invoked under Rule 19 (1a) of this Court, since the state decision that such rates are not subject to judicial review is not in accord with applicable decisions of this Court.

QUESTION PRESENTED.

Do the Courts have jurisdiction to review electric utility rates to determine whether rates meet constitutional requirements, to declare rates unconstitutional and void to prevent a City, owning and operating an electric utility, with authority delegated to it by the legislature to fix reasonable rates, from attempting to use such authority arbitrarily to fix unfair, exhorbitant rates violating the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States?

CONSTITUTION AND STATUTE INVOLVED.

The Fifth and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix, page 11. Tennessee Private Acts 1939, Chapter 381, Section 7, giving the City authority to fix rates, is printed in the Appendix, page 12.

STATEMENT OF THE CASE.

After more than 20 years solely as a retail municipal distributor of Tennessee Valley Authority power, the City of Memphis completed its own municipally owned generating facilities in 1959. But the City currently still has a contract with TVA to purchase cheap TVA power to be resold after 1959 at the greatly increased Memphis rates here in question.

Experts employed by the City "estimated" the City would require 20 percent increase from $30 million to $36 million in utility revenue in 1960 for such novel, unauthorized and arbitrary purposes as "to maintain sound financial condition", pay millions into the City treasury for general municipal purposes as "a tax equivalent", and accumulate cash through excessive depreciа-

tion sufficient to begin construction of "a fourth generating unit" (Appendix, pages 13-14), converting the city owned utility into a source of substantial city revenue, contrary to statute and constitutions.

Ignoring 1959 profits of $5 million and $55 million accumulated cash (R. 26-28, 56-60), the utility unexpectedly proposed, and the City hastily approved the requested increase (Appendix, page 16), rejecting petitioners' requests for suspension of the rates to permit fair and adequate hearing and investigation (R. 1, 3). Then having prejudged it, partisan purported "hearings" were held on eves of Christmas, New Year and City administration changes (R. 3-6). The City produced no evidence, only "estimates", speculation and conjecture, both contradictory and erroneous (R. 62).

Rates filed on December 21, 1959, approved on December 29, 1959, went into effect the same day, and have since been collected without bond (Appendix, page 19).

Petitioners, representing many thousand small consumers, filed suit in Chancery Court January 4, 1960, to have the illegal rates declared unconstitutional and void in violation of constitutions and statute and the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States (R. 9-21). Petitioners also seek a refund of the unlawful 20 percent increase being collected, which currently (July, 1960) approximates $3 million and is increasing at the rate of about $500 thousand per month.

The Chancellor granted an injunction, modified January 8, 1960 (Appendix, pages 21, 22). The utility failing to answer, a pro confesso judgment was taken in Chancery Court February 4, 1960 (R. 35).

February 25, 1960, the utility presented its petition for certiorari to the Tennessee Court of Appeals alleging the Chancellor was without jurisdiction, that the City

Commission in fixing rates was acting in a proprietary and not a governmental capacity, and its action fixing rates was final and conclusive and not subject to judicial review.

February 26, 1960, the Court of Appeals granted the utility's petition, dissolved the injunction and dismissed the bill, holding the Chancellor was "without jurisdiction to grant the relief prayed" (Appendix, page 27). Timely petition for review presented to the Tennessee Supreme Court was denied without written opinion June 6, 1960 (Appendix, page 28).

The record presents a question of law involving the jurisdiction of the Courts over rates of municipally owned and operated utilities, since in the record all material facts are uncontroverted.

THE FEDERAL QUESTION RAISED.

The federal question was raised at the pleading stage by the following language:

> "19. Petitioners would further show that they are home owners and consumers of electric power distributed by the respondent Memphis Light, Gas and Water Division, and as such are required monthly to pay electric rates imposed by Memphis Light, Gas and Water Division and the City of Memphis, and as such, all of the above illegal acts imposing illegal, discriminatory, arbitrary and confiscatory rates, have the effect of depriving them of their property without due process of law, and contrary to the laws of the State of Tennessee, and the Constitutions of the State of Tennessee and of the United States, namely the Fifth and Fourteenth (Sec. 1) Amendments to the Constitution of the United States and Article 1, Section 8, of the Constitution of the State of Ten-

nessee, and that all of the above action of the respondents is illegal, arbitrary, discriminatory and has the effect of depriving petitioners of their vested legal rights by constructive fraud."

Original Petition, R. 18-19.

The federal question was raised in the Supreme Court of Tennessee by assignments of error 1 and 7:

"1. The Court of Appeals erred because it ignored and did not hold that there was no evidence to sustain said electric rate increase. The Court should have, therefore, held that said increase was arbitrary, capricious, unconstitutional and void, and violated due process, Article 1, Sections 8 and 21 of the Constitution of the State of Tennessee and the Fifth and Fourteenth (Section 1) Amendments to the Constitution of the United States (R. 88).

"7. The Court of Appeals erred in not holding that the Chancellor has the right to review the rates for electric power service in the City of Memphis to determine if they meet the requirements of the Constitution of the State of Tennessee, Article 1, Sections 8 and 21, and the Constitution of the United States, Fifth and Fourteenth (Section 1) Amendments" (R. 89).

The only way for the Tennessee appellate courts to decide this case against these petitioners was to ignore petitioners' constitutional rights. In spite of the fact that the federal constitutional question was repeatedly and strongly raised and presented, it was so ignored.

We invite this Court to inspect the state decrees appended hereto in their entirety to discover one reference to the constitution, or even use of the word, or citation to authority or testimony. The state courts achieved their result in this case only by avoiding and pretermitting all the substantial questions of law and fact presented.

REASONS FOR GRANTING THE WRIT

1. This writ should be granted for the reason that it is difficult to conceive of circumstances more replete in blatant disregard of constitutional rights. This individual freedom from the exercise of arbitrary power, expressed in due process of law in the Fifth and Fourteenth Amendments, has no meaning unless enforced in such cases at the state and local level.

Clearly the city's power to fix rates for its own municipal utility is not a power arbitrary and absolute. Yet clearly, in this case, the city so claims and has arbitrarily established rates without evidence whatsoever to support them, claims these rates absolutely final and conclusive and not subject to judicial review, denies these petitioners a fair hearing, and denies all governmental restraints or obligations, claiming the unrestrained caprice of a proprietor, not subject even to the obligations of a public utility privately owned.

2. This writ should be granted because a settlement of this question by this Court is plainly in the public interest.

In this case the City of Memphis is using its municipally owned utility to produce profit, cash and municipal revenue. It is important in the administration of all municipally owned public power systems to establish that they cannot be arbitrarily so prostituted. **Tennessee Code Annotated**, Section 6-4303. Public and private power are subject to restraints.

This question is important not only to the 175,000 customers and 600,000 population served by the Memphis municipally owned electric system, with $250 million plant investment, due to receive rate refunds of more than $3 million and relief from paying millions in further in-

creases, this question is important also to the millions served throughout the United States by municipally owned or publicly owned power. It is important to municipalities throughout the United States seeking new sources of municipal revenue. It is important to the Tennessee Valley Authority which retails to small consumers all of its power in Tennessee through publicly owned distributors created by the legislature and subject to the courts of Tennessee. It is important to the government of the United States, the Congress and taxpayers of the United States, because of the billions of federal funds invested in Tennessee in hydro-electric and steam electric power generation. Surely this Court will take this opportunity to make it clear that state or local authorities have no power, arbitrary or otherwise, to divert this great investment to their own or other uses. **Tennessee Electric Power Company v. Tennessee Valley Authority**, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543. A new pattern may develop unless the high principles of public power are now reiterated.

3. This writ should be granted for the reason that the Tennessee decisions in this case involve federal constitutional questions of substance not in accord with applicable decisions of this Court.

City council rate making is governmental. **City of Seymour v. Texas Electric Service Co.**, 66 F. (2d) 814, 817, certiorari denied 290 U. S. 685, 54 S. Ct. 121, 78 L. Ed. 590. Proprietary, says Tennessee. **Bybees Branch Water Association v. Town of McMinnville**, 333 S. W. 2d 815, opinion by Chief Justice Prewitt of Tennessee Supreme Court, March 11, 1960, rehearing denied April 6, 1960.

Contrary to Tennessee, this Court in applicable decisions holds that rate making, however done, is subject to judicial review to determine if constitutional requirements

have been met. **St. Joseph Stock Yards Co. v. United States**, 298 U. S. 38, 56 S. Ct. 720, 725, 80 L. Ed. 1033; **Springfield Gas and Electric Co. v. Springfield**, 257 U. S. 66, 42 S. Ct. 24, 66 L. Ed. 131; **Missouri Pacific Railway Co. v. Tucker**, 230 U. S. 340, 349, 33 S. Ct. 961, 57 L. Ed. 1507; **Knoxville Gas Co. v. City of Knoxville**, 261 Fed. 283, 287.

Having paid 4.4705 percent interest on $163 million utility bonds, the City of Memphis decided to finance future construction from cash without issuing further municipal bonds and at the same time put rates high enough to add to municipal revenues. Ignoring 1959 profits of $5 million and $55 million accumulated cash (R. 57), one city expert estimated 1960 loss of $6 million. Another city expert estimated 1960 profit of $4,262,368 (R. 62).

The city's own figures, all "estimates," improperly included $2,843,000 municipal revenue ("in lieu of taxes"), at least $3,707,000 improper depreciation, $1,380,000 unnecessary debt reserve, and $694,000 unnecessary interdepartmental payments, totalling $8,624,000 improperly charged against revenues (R. 62).

All of this being no more than an "estimate," forecast, speculation and conjecture, in so far as it was considered evidence by the Tennessee Supreme Court, was contrary to the decisions of this Court in the **Minnesota Rate Cases**, 230 U. S. 352, 452, 33 S. Ct. 729, 57 L. Ed. 1511, and **Los Angeles Gas Co. v. Railroad Commission**, 289 U. S. 287, 307, 317, 53 S. Ct. 637, 77 L. Ed. 1180.

4. With the increase and growth of public power, plus the large direct participation by the United States in power production, resold through municipalities, it is essential to have a current review and holding by this Court that rates fixed by a municipality are subject to the same restraints, review and constitutional requirements as rates

fixed by any other rate fixing or rate regulating body. Rates fixed for publicly owned utilities are subject to review by the courts to the same extent as rates fixed for utilities privately owned.

CONCLUSION.

For all the foregoing reasons, to protect not only these consumers, but consumers and purchasers of private and public power, everywhere, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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